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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-49

JOSEPH LISCHKO,

Petitioner,

vs.

ROBERT J. GALLI, Sheriff of Washoe County, State of Nevada,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The unreported ~~memorandum~~ opinion of the United States Court of Appeals for the Ninth Circuit appears in the petition in Appendix E. The decision of the United States District Court for the District of Nevada is

printed in Appendix D of the petition. The reports of decisions in the state courts appearing in Appendices A, B and C of the petition are immaterial.

JURISDICTION

The statutory provision cited by petitioner--28 U.S.C.A. 2254(1)--confers no jurisdiction upon this Court to entertain the petition.

QUESTIONS PRESENTED FOR REVIEW

The questions propounded for review by the petitioner do not raise justiciable issues. Errors, if any, occurring in the course of post-conviction review in the state system were rendered moot by the de novo evidentiary proceedings conducted at the federal level upon Mr. Lischko's petition for writ of habeas corpus.

Petitioner has not presented the only question of possible concern to this Court. That issue might have been phrased: Whether the standard adopted by the district court and affirmed by the Court of Appeals to evaluate the efforts of defense counsel correctly reflects the mandate of the Sixth Amendment?

STATEMENT OF THE CASE

Mr. Lischko seeks, by way of his petition, a review of the judgment of a federal court. The United States District Court for the District of

Nevada first obtained jurisdiction in the matter by way of a petition for writ of habeas corpus pursued by Mr. Lischko under authority found in 28 U.S.C. § 2254.

In early 1970, with the assistance of retained counsel, the petitioner, Joseph Lischko, was tried in state court for the crime of kidnapping. He was convicted and sentenced to serve 20 years in the Nevada State Prison. Through a different appointed counsel, he appealed the judgment to the Nevada Supreme Court. The conviction was affirmed in Lischko v. State, 87 Nev. 493, 589 P.2d 89 (1971).

With the aid of yet another attorney, his present counsel, the prisoner next returned to the trial court to seek post-conviction relief pursuant to the Nevada statutory scheme. NRS 177.315 et seq. There, he raised in issue for the first time the adequacy of his representation at trial. The Court agreed with his contentions, and a new trial was ordered. The State appealed.

A 4-1 majority of the Nevada Supreme Court concluded that the record was insufficient to support the decision of the lower court. Mr. Lischko failed to demonstrate "by clear and convincing evidence that counsel's representation was of such a low caliber as to reduce the trial to a sham, a farce or a pretense." Warden v. Lischko, 90 Nev. 221, 224-225,

523 P.2d 6 (1974).

By way of petition for writ of habeas corpus in federal district court, Mr. Lischko argued that the test adopted by the Nevada Supreme Court was unduly harsh and that he had not in fact received competent assistance of counsel. In addition to reviewing the records of state proceedings, the Court conducted an evidentiary hearing. The substance of testimony received from Mr. Lischko is reflected in the petitioner's present statement of the case under the label "Facts." Absent from that statement, however, is the substance of testimony received in district court which controverted the petitioner's position. Further, and more importantly, Mr. Lischko's retained counsel explained what he had done on his client's behalf and why he had not attempted some of the things the petitioner now describes as essential. It was conceded at the hearing that the original counsel was an accomplished, experienced defense attorney.

Thus informed, the Court concluded that counsel "did investigate, did prepare, and did make informed tactical decisions" in conducting defense of the petitioner. In light of such findings, the Court determined, as a matter of law, that Mr.Lischko failed to carry "the burden of showing that he had counsel who was not reasonably likely to render, and did not render, reasonably effective assistance." Appendix D of the Petition,

pp. xvi-xxvii.

Mr. Lischko sought a review by the Court of Appeals for the Ninth Circuit. It was there decided that the district court had based its conclusion on a correct view of the law and facts. A petition for rehearing was denied, and a suggestion for rehearing en banc was rejected on June 19, 1976. His present petition followed.

ARGUMENT

THE STANDARD ADOPTED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS TO EVALUATE ITS FACTUAL DETERMINATION OF THE EFFORTS OF COUNSEL EXPENDED ON PETITIONER'S BEHALF AT TRIAL WAS CORRECT, REASONABLE, WORKABLE AND CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS.

The petitioner, Mr. Lischko, was afforded a de novo evidentiary hearing in U. S. District Court upon his petition for writ of habeas corpus. The Court thereupon made findings of fact and reached conclusions of law independent of any prior state proceeding on the issue of adequate representation of counsel. Shortcomings in the Nevada system, if there be any, are therefore academic. The issues now raised by the petitioner in this regard are moot.

At the hearing, it was conceded that Lischko's trial counsel was an excellent lawyer with substantial experience in criminal law. Conflicting testimony was heard regarding his performance in this particular trial. Mr. Lischko continues to argue for the quality and quantity of the evidence which might indicate inactivity or incompetence. He does not argue, however, nor can he, that there was heard insufficient evidence to support the findings of the Court that the trial counsel did investigate, did prepare and did make informed tactical decisions in the conduct of the trial. The only viable question that can be raised, therefore, is whether the Court measured its findings of counsel performance against the proper constitutional standard. The respondent submits it did. Respondent further submits that the standard adopted by the Court, and affirmed by the Court of Appeals for the Ninth Circuit, neither conflicts with any decision of this Court, nor is it inconsistent with the decisions of the other courts of appeal.

For many years, the courts have described a constitutionally inadequate performance by defense counsel as one which reduces the proceedings to a mockery of justice. The Ninth Circuit has been in the forefront of courts using this standard. Stanley v. United States, 239 F.2d 765 (9th Cir. 1957); Peck v. United States, 321 F.2d 934 (9th Cir. 1963). Other circuits have also used the term and continue to do so. See Ruse v.

United States, 379 F.2d 113 (D.C. 1967); United States v. Yaneshefsky, 500 F.2d 1327 (2d Cir. 1974), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950)

The words "farce", or "mockery" are admittedly not words of precision. The courts of various circuits--and the same courts at various times--have qualified, amplified and clarified the meaning of the terms. The petitioner contends that because courts have used different language in this effort, there exists conflicting standards among the circuits which must be resolved by this Court. That is not the case; the words may differ, but the concept adopted by the district court and affirmed by the Ninth Circuit in the case at bar is very much like the test used throughout the country.

A common thread found in all decisions known to the respondent is that much more than mere allegations of inadequate counsel is required before a conviction will be overturned. In the instant case, the district court held that Mr. Lischko had "the burden of showing" ineffective assistance of counsel. Another court has held the same thing, in effect, by saying there exists "a presumption that counsel is competent which must be overcome by the petitioner..." McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974). Another has described the burden as the "stringent

standard to be met to show inadequacy of counsel." United States v. Maxie, 462 F.2d 474, 483 (2d Cir. 1974).

What the petitioner must show has also been expressed in varied terms, but all convey a theme similar to the aforementioned "farce" or "mockery" test. One court described a constitutionally inadequate counsel as one who was "transparently inadequate." Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965). Another court determined that the Sixth Amendment is offended only when a "strong showing is made that the conduct of counsel virtually deprived defendant of a trial..." United States v. Bella, 353 F.2d 718, 179 (7th Cir. 1965); quoted in United States v. Robinson, 502 F.2d 894 (7th Cir. 1974).

None of these terms, it is submitted, were intended to be construed literally. In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court made clear a defendant is entitled to counsel. This has never been construed to mean perfect counsel; it has never been held that the performance of counsel, when viewed from hindsight, must be error free. A defendant is only entitled to a lawyer who makes a lawyer-like effort. This was the standard adopted in the case at bar and the one utilized throughout the circuits. Mr. Lischko was entitled to a counsel reasonably likely to render, and rendering, reasonably effective assistance. West v.

Louisiana, 478 F.2d 1026 (5th Cir. 1973); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); United States v. Beaseley, 491 F.2d 687 (6th Cir. 1974). After close scrutiny of the facts in question, the lower courts determined that the caliber of assistance received by Mr. Lischko conformed, at the very least, with this mandate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 11th day of August, 1976.

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